**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE J.B.KOSHY**

**MONDAY, THE 16TH JULY 2007 / 25TH ASHADHA 1929**

**CRL.A.No. 169 of 2003(B)**

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**CC.813/1998 of JUDL.MAGISTRATE OF FIRST CLASS, MAVELIKKARA**

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**APPELLANT: COMPLAINANT**
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**ISMAIL RAWTHER, KARUPARAMBIL HOUSE,**
**ALIKKATTUKULANGARA, PALAMEL VILLAGE.**

**BY ADV. SRI.P.B.SAHASRANAMAN**
**SRI.K.JAGADEESH**
**SRI.T.S.HARIKUMAR**

**RESPONDENTS: ACCUSED AND STATE**
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**1. K.B.REMANAN, KADUKILATHU HOUSE,**
**PUTHIYAVILLA, KANALLOR, CHANGANASSERRY, KOTTAYAM.**

**2. STATE OF KERALA, REPRESENTED BY THE**
**DIRECTOR OF PROSECUTION, HIGH COURT OF KERALA,**
**ERNAKULAM.**

**BY ADV. SRI.V.P.SUKUMAR**
**PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**J.B.KOSHY, J.**

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**Criminal Appeal.No.169 OF 2003 (A)**

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**Dated this the 16th day of July, 2007**

**JUDGMENT**

Appellant filed a complaint contending that cheque bearing No.831775 dated 5.6.1998 for Rs.1,70,000/- was dishonored due to insufficiency of funds. Hence complaint was filed. The trial court acquitted the accused on the finding that cheque was issued as a collateral security and not in discharge of a legally enforceable debt. In the statement of facts, it is averred by the petitioner as follows:

> "On 5.3.1998 the accused along with his wife and son executed a bond in favour of the complainant for discharge of the debt incurred by them. As per the terms of the above said bond the accused issued a cheque bearing NO.831775 dated 5.6.1998 for Rs.1,70,000/- (Rupees one lakh and seventy thousand) on an account maintained by the accused with the State Bank of Travancore, Kandalloor Branch in discharging the liability incurred by the accused and made the complainant believe that the cheque will be honored on presentation to the bank."

Bond said to have been executed on 5.3.1998 in favour of the complainant by the accused, his wife and same was not produced and proved in evidence. In the chief examination he stated that the complainant's son had vehicle dealings with the accused and it created problems and accordingly cheque was issued and as per the cheque Rs.1,70,000/- was due. His definite case in the chief examination is as follows:

He also stated that for building chasis of his bus, it was entrusted to the son of the accused. On 27.9.1997 in connection with that an agreement was executed and that was produced in the Sub Court. He stated as follows:

He also stated that accused, his wife and son went to his office for enabling him to take Rs.50,000/-. But he added that on 5.9.1998 he gave Rs.1,70,000/-. So his definite question in the complaint that he gave Rs.1,70,000/- to the accused. But then Ext.D2 agreement was shown to the accused suggesting that in O.S.No.90/1998 filed by him he stated that a cheque was issued with regard to that transaction but as he answered that he was not remembering that the cheque was issued on the basis of the agreement as collateral security. In the complaint or in the chief examination he had no case that the cheque was issued because he had discharged the liability of the son of the accused by paying Rs.1,20,000/- to Swaminathan and another Rs.50,000/- given by him to the son of the accused. It is contended that the finding of court that even if it is given for discharging the liability of the son of the accused cheque cannot be treated as one issued in discharge of a legally enforceable liability. But in this case in the complaint or in the evidence in the chief examination has no case that Rs.1,70,000/- was given in discharge of the liability of son of the accused towards Swaminathan. The said Swaminathan was not examined. Ext.D2 was produced by the defendant to show that the cheque was issued as collateral security with regard to

that agreement. In any event, the complainant has no consistent case because in complaint his case was that he gave Rs.1,70,000/- and cheque was issued on 5.6.1998 and cheque was issued in discharge of the same. It is true that there is a presumption under Section 139 of the Negotiable Instruments Act but it is a rebuttable presumption and by cross examination of the appellant that presumption was rebutted. In this case we refer to the Supreme Court decision in ***Narayana Menon v. State of Kerala (2006 (3) KLT 404 (SC))***. His pleading in the complaint, during chief examination and in the arguments are different. Appellant failed to prove his case that respondent issued the cheque for a legally enforceable debt. Hence I am of the opinion that no grounds are made out in interfering in the order of acquittal by the trial court. But I make it clear that this observation in this judgment cannot have any impact on the civil case pending in the Sub Court. Accordingly this appeal is dismissed.

**J.B.KOSHY, JUDGE**

**prp**

**J.B.KOSHY**

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**Criminal.Appeal.169 OF 2003 (A)**

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**JUDGMENT**

**16th July, 2007**